

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Minerva Warner

Court of Appeals No. L-08-1392

Appellee

Trial Court No. CI0200704893

v.

Keystone Automotive Industries, Inc., et al.

Defendants

DECISION AND JUDGMENT

[Director, Department of Job and
Family Services - Appellant]

Decided: July 10, 2009

* * * * *

Richard Cordray, Attorney General of Ohio, and Eric A. Baum,
Managing Attorney, for appellant.

* * * * *

SINGER, J.

{¶ 1} This appeal comes to us from a judgment issued by the Lucas County Court of Common Pleas, in an administrative appeal, from a decision of the Ohio Unemployment Compensation Review Commission. For the reasons that follow, we reverse.

{¶ 2} From September 2004 until July 2006, appellee, Minerva Warner, was employed as a salesperson for Keystone Automotive Industries ("Keystone"), an auto parts wholesaler. She was terminated in July 2006. Thereafter, she filed a claim for unemployment compensation benefits with appellant, the Ohio Department of Job and Family Services ("ODJFS"). On August 9, 2006, her claim was allowed based on a finding that she had been terminated without just cause pursuant to R.C. 4141.29(D)(2)(a).

{¶ 3} Keystone appealed the determination twice and twice, the ODJFS affirmed its determination. On January 16, 2007, Keystone again appealed and the ODJFS transferred the appeal to the Unemployment Compensation Review Commission. A hearing was held on March 25, 2007.

{¶ 4} Mike Gittings, general manager for Keystone, testified that he terminated appellee's employment because she took an unauthorized leave of absence in violation of company policy. Gittings explained that employees must request time off in advance. After appellee had taken four days of authorized vacation leave, she failed to return to work. The day she was scheduled to return to work, May 30, 2006, Gittings testified that he received a phone call from someone identifying themselves as a nurse. The "nurse" informed Gittings that appellee had undergone surgery and that she would be unable to return to work until June 21. Thereafter, Gittings, as well as the company's human resources director, attempted to contact appellee by phone numerous times but she never answered and she never responded to their messages. Finally, on June 13, 2006, Allison

Howell, Keystone's human resources director, sent appellee a letter informing her that she needed to contact the company immediately or she would be considered to be in job abandonment. The next day, appellee contacted Howell and acknowledged receipt of the letter. According to Gittings, appellee told Howell she had been absent from work because she had undergone surgery. Howell explained to appellee that the company needed documentation of her surgery, and if it was emergency surgery, since they had not received prior notice of appellee's absence pursuant to the employee handbook.

{¶ 5} Appellee returned to work on June 21, 2006, and resumed her duties.

Gittings testified that on numerous occasions, he and Howell asked appellee for documentation of her surgery to explain her absence. Gittings testified that at this point, he assumed the surgery was an emergency as appellee never requested the time off beforehand. Appellee brought Gittings several doctor's notes, none of which identified the surgery or the reason for the urgency. One of the notes, dated May 21, states that appellant will need to be off work after surgery for 2½ weeks. Gittings testified that he and Howell "tried to give [appellant] the benefit of the doubt" as she was a good two year employee. After giving appellee what he believed to be a sufficient amount of time to bring in the proper documentation, specifically 26 days, Gittings testified that he decided to terminate her on the basis of job abandonment on July 17.

{¶ 6} Appellee testified that she underwent surgery on May 30. At the time she believed she could return to work without taking any more time off other than her approved vacation. She testified that she had a nurse call Gittings to tell him that she

would not be returning to work until June 21. Appellee did not call Gittings herself because she was afraid he would be angry. Appellee explained that when she had called off work in the past, Gittings would become irate. On one occasion, appellee described Gittings response to her phone call as "vulgar." Appellee denied receiving any phone messages from Gittings or Howell before she received the June 16 letter. Appellee also testified that Gittings never asked her for more medical documentation after she returned to work. Appellee testified that Gittings did not tell her there was a problem with her leave of absence until the day he terminated her. Appellee testified that she was not aware of the company policy requiring employees absent from work to make daily contact with their supervisor until their leave is approved. She acknowledged that she has a copy of the employee handbook but she testified she has not read it.

{¶ 7} In May 2007, a hearing officer issued a decision reversing the ODJFS's determination allowing appellee's claim for benefits finding that she was terminated with just cause. The decision reads in pertinent part:

{¶ 8} "The medical evidence in this record establishes that the claimant did know that she would have to miss work. Claimant's physician wrote, on May 19, 2006, that claimant had surgery scheduled for May 30, 2006, and that she would be off work two and one-half weeks thereafter due to her surgery. This medical evidence contradicts claimant's testimony that she did not know that she would have to miss any work. * * * The evidence further establishes that claimant failed to call off and/or report to work between June 5, 2006 and June 14, 2006, despite numerous messages from her supervisor

and the human resources representative. A phone call from someone claiming to be a surgeon's nurse is insufficient."

{¶ 9} The Lucas County Court of Common Pleas, in reversing the decision of the UCRC, found that appellee's contacts with her supervisor were sufficient to overcome Gittings' claim that she had abandoned her job. The court further took issue with the fact that Gittings waited almost 30 days before terminating her. ODJF now appeals setting forth the following assignments of error:

{¶ 10} "I. Ordinarily, the test for whether an individual's termination from employment is for just cause is whether there was a justifiable reason for the individual's doing or not doing a particular on-the-job act. A separate, four-part test -- the one used by the trial court here -- is to be used only where the employee is terminated for deficient job performance. It is not to be used where the employee is terminated for any other reason. (*Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, followed: *Tzanga, Plakas & Mannos v. Ohio Bur. of Emp. Services* (1995), 73 Ohio St.3d 694, paragraph four of the syllabus explained).

{¶ 11} "II. The administrative record contains some competent, credible evidence showing that appellee knowingly violated company policy by taking a prolonged absence from employment without obtaining prior supervisory approval. The Ohio Employment Compensation Review Commission's finding that she was terminated with just cause, therefore, should be affirmed. (*Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, followed).

{¶ 12} Appellant's assignments of error will be addressed together. Appellant contends that the trial court erred in reversing the decision of the Unemployment Compensation Review Commission.

{¶ 13} Pursuant to R.C. 4141.29(D)(2)(a), an employee is ineligible to receive unemployment compensation benefits if he or she was discharged for "just cause." Just cause is conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge. *Cooper v. Ohio Dept. of Job and Family Servs.* (Jan. 15, 2002), 4th Dist. No. 01 CA2783, citing *Durgan v. Ohio Bur. of Emp. Serv.* (1996), 110 Ohio App.3d 545. In determining an application for unemployment compensation, the commission considers whether an award of benefits will further the underlying purpose of unemployment compensation: to provide financial assistance to those who become unemployed through no fault of their own. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 697.

{¶ 14} When seeking unemployment benefits, an applicant submits information to the ODJFS in support of his or her claim. Findings of fact and conclusions of law as to whether a discharged employee is entitled to unemployment compensation are initially made by the designee of the Director, ODJFS, R.C. 4141.28(B), subject to an appeal to the Unemployment Compensation Review Commission ("UCRC"), R.C. 4141.281(C)(1), for a hearing de novo. R.C. 4141.281(C)(3).

{¶ 15} A party who is dissatisfied with the final determination of the UCRC may appeal that decision to the appropriate court of common pleas, which shall hear the

appeal on the record certified by the commission. R.C. 4141.282(H). "If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence * * *" it may reverse the determination. *Id.* On review of purely factual questions, the common pleas court is limited to determining whether the UCRC hearing officer's determination is supported by the evidence in the record. *Tzangas*, supra at 696. Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed. *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 16} This court "may only reverse an unemployment compensation eligibility decision by [UCRC] if the decision is unlawful, unreasonable, or against the manifest weight of the evidence." (Quotations omitted.) *Markovich v. Emps. Unity, Inc.*, 9th Dist. No. 21826, 2004-Ohio-4193, ¶ 10. When an appellate court reviews the common pleas court's review, it applies the same standard. *Tzangas*, supra. In such cases, this court is "required to focus on the decision of [UCRC], rather than that of the common pleas court[.]" *Markovich*, ¶ 10, citing *Barilla v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, ¶ 6. "Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the UCRC]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

{¶ 17} *Tzangas* set out a four-prong test for finding the employee at fault and, therefore, discharged for good cause: (1) the employee does not perform the required work; (2) the employer made known its expectations to the employee at the time of

hiring; (3) the expectations were reasonable; and (4) the requirements of the job did not change substantially since the date the employee was hired for the position. *Id.*, paragraph four of the syllabus.

{¶ 18} Appellant contends that the court erred in applying the *Tzangas* test to appellee's case because the *Tzangus* factors only apply to cases in which the employee is terminated for poor job performance. Appellant urges us to apply *Irvine v. Unemployment Comp. Bd.* (1985), 19 Ohio St.3d 15, which, appellant claims, sets forth a more generalized fault based analysis. We fail to see the need to distinguish these two cases which many courts, including this one, have applied jointly to employment cases. See *Marchese Servs. v. Bradley*, 3d Dist. No. 12-08-06, 2009-Ohio-2618, *Woodworth v. Ohio Dept. of Job & Family Servs.*, 8th Dist. No. 91601, 2009-Ohio-734, and *Louis v. Excel Contracting* (Jan. 26, 2001), 2d Dist. No. 18447.

{¶ 19} In any event, it can be argued that appellee was terminated for poor job performance as her absence made it impossible for her to perform the required work thereby rendering her job performance poor. Moreover, it is well settled that unauthorized absences can provide an employer with the necessary just cause to dismiss an employee. *Metal Powder Products, Inc. v. Ohio Bur. of Emp. Serv.* (1990), 69 Ohio App.3d 785, 788; *Bennett v. Director, Ohio Dept. of Job & Family Servs.*, 7th Dist. No. 03-MA-222, 2005-Ohio-3313, ¶ 28; *Higgins v. Patterson Pools, Inc.* (Sept. 10, 2000), 10th Dist. No. 99AP-1394, and *Coleman v. Ohio Bur. of Emp. Serv.* (Nov. 30, 1995), 8th Dist. No. 68853.

{¶ 20} We have extensively reviewed the record and conclude that the decision of the UCRC is supported by the evidence. Gittings testified that it was company policy, found in appellee's employee handbook, that employees must seek prior approval for taking time off. If an employee must take time off due to an emergency, the employee must be able to document such emergency and remain in contact with his or her supervisor. Gittings testified that appellee failed to follow the policy. Despite denying that she knew ahead of time that her surgery would require a lengthy leave of absence, there is evidence that she in fact did know in the form of her doctor's note dated before her surgery date. Moreover, there is evidence that Gittings gave appellee a sufficient amount of time to remedy the situation before terminating her. Accordingly, we cannot say that the UCRC's "just cause" determination was unlawful, unreasonable, or against the manifest weight of the evidence. Appellant's two assignments of error are found well-taken.

{¶ 21} The judgment of the Lucas County Court of Common Pleas is reversed, and the cause is remanded for further proceedings. Appellee is ordered to pay the costs of this appeal pursuant to App.R.24.

JUDGMENT REVERSED.

Warner v. Keystone Automotive
Industries, Inc.
C.A. No. L-08-1392

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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